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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-975

GOVERNMENT OF INDIA, *Petitioner*,

v.

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION, AND THE UPJOHN COMPANY, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

	Page
REPORTS OF OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
PROCEDURAL HISTORY	3
OPINIONS BELOW	6
BACKGROUND STATEMENT	8
REASONS FOR GRANTING THE WRIT	11
The Decision of the Court of Appeals Has Important Consequences for the Administration of the Antitrust Laws in the Foreign Commerce of the United States and for American Foreign Economic Relations	11
The Writ Should Be Granted to Review Important Issues implicating the Sovereignty of Nations	18
The Writ Should Be Granted to Resolve Conflicts Between Decisions of Courts of Appeal and to Resolve Conflicts in Principle Between the Decision of the Eighth Circuit and Opinions of this Court	29
APPENDIX A: Decision of the Court of Appeals	1a
APPENDIX B: Miscellaneous Order 74-40	18a
APPENDIX C: Miscellaneous Order 74-37 and Opinion	19a
APPENDIX D: Order Extending Time to File Petition For a Writ of Certiorari	23a
APPENDIX E: Complaint	24a
APPENDIX F: Defendants' Memorandum in the District Court Re Certification of a Class of Private Hospitals in the Phillippines	27a

CITATIONS

Page

CASES:

Afran Transport Company v. *National Maritime Union*, 169 F. Supp. 416 (S.D.N.Y. 1958); 175 F. Supp. 285 (S.D.N.Y. 1959) 11

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964) 21, 28, 29

Bersch v. *Drexel Firestone, Inc.*, 519 F.2d 947 (C.A. 2 1975) 13

California v. *Frito-Lay, Inc.*, 474 F.2d 774 (C.A. 9), *cert. denied*, 412 U.S. 908 (1973) 6, 10

Carnivale Bag Co., Inc. v. Slide-Rite Mfg. Corp., 395 F. Supp. 287 (S.D.N.Y. 1975) 25

Chas. Pfizer & Co., v. *F.T.C.*, 401 F.2d 574 (C.A. 6 1968), *cert. denied*, 394 U.S. 920 (1969) 4

Constructores Civiles de CentroAmerica, S.A. v. *Hannah*, 459 F.2d 1183 (C.A. D.C. 1972) 16

Dexter & Carpenter, Inc. v. *Kunglig Jornuagsstyrelson*, 43 F.2d 705 (C.A. 2 1930) 25

French v. *Banco Nacional de Cuba*, 23 N.Y. 2d 46, 242 N.E. 2d 704 (Ct. App. 1968) 9, 19, 28, 30

French Republic v. *Saratoga Vichy Co.*, 191 U.S. 427 (1903) 12

Georgia v. *Pennsylvania R.R.*, 324 U.S. 439 (1945) ... 10

Griswald v. *Connecticut*, 381 U.S. 479 (1965) 32

Hartford Hospital v. *Chas. Pfizer & Co.*, 52 F.R.D. 131 (S.D.N.Y. 1971) 3

Hanover Shoe v. *United States Machinery Corp.*, 392 U.S. 481 (1968) 30, 31

Hawaii v. *Standard Oil of California*, 301 F. Supp. 982 (D. Hawaii 1969) 10

Hawaii v. *Standard Oil Co.*, 405 U.S. 251 (1972) 7, 12

In re Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971) 8, 12, 22, 31

In re Antiobiotic Antitrust Actions; State of Kuwait v. *Chas. Pfizer & Co., et al.*, 333 F. Supp. 315 (S.D.. N.Y 1971) 5

In re Antibiotic Drugs, 259 F. Supp. 1402 (J.P.M.L. 1968); 297 F. Supp. 1126 (1968); 299 F. Supp. 1403 (1969); 301 F. Supp. 1158 (1969); 303 F. Supp. 1056 (1969); 309 F. Supp. 155 (1970) 3

In re Antibiotic Drugs, 320 F. Supp. 586 (J.P.M.L. 1970) 3

Page

In re Multidistrict Vehicle Air Pollution Control Equipment, 481 F.2d 122 (C.A. 9), *cert. denied*, 414 U.S. 1045 (1973) 6, 10

Indiana v. *Chas. Pfizer & Co., Inc.*, 51 F.R.D. 493 (S.D. N.Y.) 12

Johnson v. *State*, 18 N.J. 442, 114 A.2d 1 (NJ 1955) ... 10

Moviecolor, Ltd. v. *Eastman Kodak Co.*, 24 F.R.D. 325 (S.D.N.Y. 1959); aff'd 288 F.2d 80 (C.A. 2); *cert. denied*, 368 U.S. 821 (1961) 11

New Hampshire v. *Louisiana*, 108 U.S. 76 (1882) 10

New York ex rel. Hatch v. *Reardon*, 204 U.S. 152 (1906) 32

Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 (1968) 30

Petrol Shipping Corp. v. *Kingdom of Greece*, 360 F.2d 103 (C.A. 2 1965) *cert. denied*, 385 U.S. 931 (1966) 21

Philadelphia Housing Authority v. *Amreican Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1057 (E. D. Pa. 1969, *aff'd*, 438 F.2d 1187 (C.A. 3 1970) 6, 10

Premier Steamship Co. v. *Embassy of Algeria*, 336 F. Supp. 507 (S.D.N.Y. 1971) 21

Rosenthal v. *New York*, 226 U.S. 260 (1912) 32

Sanitary District of Chicago v. *United States*, 266 U.S. 405 (1925) 10

Shelley v. *Kraemer*, 334 U.S. 1 (1948) 24

Standard Stock Food Co. v. *Wright*, 225 U.S. 540 (1912) 32

State of Illinois v. *Bristol-Myers Co.*, 470 F.2d 1276 (U.S. App. D.C. 1972) 12

State of Minnesota v. *United States Steel Corp.*, 299 F. Supp. 596 (D. Minn. 1969), *vacated on other grounds*, 438 F.2d 1380 (C.A. 8 1971) 16

State of Minnesota v. *United States Steel Corp.*, 308 F Supp. 963 (D. Minn. 1970) 25, 27, 32, 33

State of Washington v. *American Pipe & Construction Co.*, 274 F. Supp. 961 (D.C. Cal. Hawaii Or. Wash. 1967) 26

State of West Virginia v *Chas. Pfizer & Co.*, 440 F.2d 1079 (C.A. 2 1971), *cert. denied*, 404 U.S. 871 (1971) 3, 10, 12, 15, 25, 29, 30

The Marat, 145 F.2d 431 (C.A. 3 1944) 9

Tileston v. *Ullman*, 318 U.S. 44 (1943) 32

Underhill v. *Hernandez*, 168 U.S. 250 (1897) 28

Page

United States v. *Belmont*, 301 U.S. 324 (1936) 27
United States v. *Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D.N.Y. 1970) 19
United States v. *Chas. Pfizer & Co.*, 281 F. Supp. (S. D.N.Y. 1968); 426 F.2d 32 (C.A. 2 1970) *modified* 437 F.2d 957 (C.A. 2 1970) *aff'd by equally divided court* 404 U.S. 548; 367 F. Supp. 91 (S.D.N.Y. 1972) 4
United States v. *Minnesota*, 270 U.S. 181 (1925) 19
United States v. *Pink*, 315 U.S. 203, 216 (1941) 28
United States v. *San Jacinto Tin Co.*, 125 U.S. 273, 286 (1888) 18, 19
Victory Transport v. *Comisaria General*, 336 F.2d 354 (C.A. 2 1964) *cert. denied*, 381 U.S. 934 (1965) .19, 21
Weilamann v. *Chase Manhattan Bank*, 21 Misc. 2d. 1086, 192 N.Y.S. 2d 469 (Sup. Ct. 1959) 25
Yazoo & M. Valley R. Co. v. *Jackson Vinegar Co*, 226 U.S. 217 (1912) 32

STATUTES

Sherman Act, 26 Stat. 209, 15 U.S.C. § 1 *et seq.* 3
15 U.S.C. § 1 3
15 U.S.C. § 2 3

Clayton Act, 38 Stat. 731, 15 U.S.C. § 12 *et seq.* 3
15 U.S.C. § 15 5
15 U.S.C. § 15a 3
15 U.S.C. § 16(b) 4
15 U.S.C. § 18 3

22 U.S.C. § 286h 20
22 U.S.C. § 286k 22
Foreign Assistance Act of 1961, 75 Stat. 424, 22 U.S.C. § 2151 *et seq.* 14
22 U.S.C. § 2161(b)(6) 14
22 U.S.C. § 2171 14
22 U.S.C. § 2171(b)(5) 14
22 U.S.C. § 2171(b)(6) 14
22 U.S.C. § 2197(k) 14
22 U.S.C. § 2211(b)(4) 14
22 U.S.C. § 2351(b)(4) 23
22 U.S.C. § 2356(c) 14
22 U.S.C. § 2370(e)(2) 28

Page

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1292(b) 6

Federal Rules of Civil Procedure,
Rule 23, ...6, 7, 8, 12, 13, 21, 25, 26
Rule 23(c)(2) 12

TREATIES AND OTHER INTERNATIONAL AGREEMENTS:

Articles of Agreement of the International Monetary Fund, 60 Stat. 1401, T.I.A.S. 1501 (1945) Article VIII, Sec. 2(b) 20

Convention as to Tenure and Disposition of Real and Personal Property, 31 Stat. 1939, T.S. 146, 1 Maloy 774, and Supplementory Convention, 32 Stat. 1914, T.S. 402, 1 Maloy 776 23

Economic Cooperative Agreement with the Government of Viet-Nam, 2 U.S.T. 2205, T.I.A.S. 2346 17

General Agreement on Tariffs and Trade, 61 Stat. (5), (6), T.I.A.S. 1700 22

Treaty of Friendship, Commerce and Navigation with the Republic of Korea, 8 U.S.T. 2217, T.I.A.S. 3947 17

Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. 3593 17

Treaty of Friendship, Commerce and Navigation with Greece, 5 U.S.T. 1829, T.I.A.S. 3057 17

Vienna Convention on Consular Relations 21 U.S.T. 77, T.I.A.S. 6820 9

Treaty of Friendship, Commerce and Navigation with Ireland, 1 U.S.T. 785, T.I.A.S. 2155 17

Treaty of Friendship, Commerce and Navigation with Israel, 5 U.S.T. 550, T.I.A.S. 2948 17

Treaty of Friendship, Commerce and Navigation with Italy, 63 Stat. 2255, T.I.A.S. 1965 17

Treaty of Friendship, Commerce and Navigation with Nicaragua, 9 U.S.T. 449, T.I.A.S. 4024 17

Treaty of Friendship, Commerce and Navigation with Japan, 4 U.S.T. 2063, T.I.A.S. 2863 17

Page

MISCELLANEOUS:

IMF Annual Yearbooks on *Exchange Restrictions* .. 9

1972 Statistical Yearbook 11

107 Cong. Rec., 16283 (1961) 14

A. Rovine, DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW, 332 (1973) 23

26 Department of State Bull. 984 (1952) 21

Whitman's Digest of International Law, Department of State, 1968, 54-76 32

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, the Government of India, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eigth Circuit entered in this proceeding on August 27, 1975.

REPORTS OF OPINIONS BELOW

The opinion of the Court of Appeals is reported at 522 F.2d 612 and appears as Appendix "A" hereto (App. 1a). The Order of the District Court dated October 23, 1974, by Judge Miles W. Lord, sitting

by special designation, is unreported and appears as Appendix "B" hereto (App. 18a). That Order is based upon and adopts an earlier Order and opinion dealing with the same question in a related case, and the adopted Order and opinion appears as Appendix "C" hereto (App. 19a).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on August 27, 1975. On November 14, 1975, petitioner secured an extension of time in which to file this petition until January 9, 1976, by an Order of the Court signed by Mr. Justice Blackmun (App. 23a). This petition for certiorari was filed within that time period. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether the Government of India has standing to assert as official representative the antitrust damage claims of its nationals resident in India, where (i) the Government of India has a "pecuniary interest" in the litigation derived from its ownership and conservatorship of all foreign exchange in India, including foreign exchange used to accomplish the original purchases from defendants in the foreign commerce of the United States; (ii) under its laws and Constitution and by virtue of its political and social relations to its citizenry, the Government of India has "an obligation to the general public" which requires it to pursue the rights of its citizens, including those at stake herein, and (iii) alternative class action remedies are as a practical matter unavailable and as a political matter unacceptable?

(2) Whether a foreign sovereign has standing under Section 4 of the Clayton Act to assert as *parens patriae* the damage claims of its resident nationals aggrieved by conduct of defendants in conflict with the antitrust laws and affecting the foreign commerce of the United States?

PROCEDURAL HISTORY

The Government of India filed its complaint on October 15, 1974, alleging violations by defendants of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 7 of the Clayton Act, 15 U.S.C. § 18, as well as fraud and deceit by defendants, in connection with sales of broad-spectrum antibiotic products to purchasers in India.[1] The complaint

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[1] Upon filing, this case joined the more than 150 actions brought against defendants in the Southern District of New York or transferred there by the Judicial Panel on Multidistrict Litigation for coordinated or consolidated pretrial proceedings. See, *In re Antibiotic Drugs*, 295 F.Supp. 1402 (J.P.M.L. 1968); 297 F.Supp. 1126 (1968); 299 F.Supp. 1403 (1969); 301 F.Supp. 1158 (1969); 303 F.Supp. 1056 (1969); 309 F.Supp. 155 (1970). The settlement of 66 of these actions, primarily by plaintiff states and municipalities, as special class actions, was approved in *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079 (C.A. 2 1971), *cert. denied* 404 U.S. 871 (1971). Settlement was also reached in an additional group of cases involving the claims of private hospitals and blue cross plans. *Hartford Hospital* v. *Chas. Pfizer & Co.*, 52 F.R.D. 131 (S.D.N.Y. 1971). The remaining "nonsettling" cases were assigned to Judge Miles W. Lord for completion of pretrial proceedings. See, *In Re Antibiotic Drugs*, 320 F.Supp. 586 (J.P.M.L. 1970). The United States, suing for single damages under 15 U.S.C. 15a, and certain other domestic plaintiffs have since November 1974 been engaged in trial before Judge Lord on issues concerning defendants' liability. The foreign cases have been separately grouped and are still in pre-trial. The appeals on standing issues have not otherwise delayed proceedings before Judge Lord.

The civil litigations follow protracted criminal and F.T.C. proceedings which preoccupied the courts for many years. See, *inter*

alleges that as a result of concerted actions taken by defendants in violation of the antitrust laws, Indian purchasers (including hospitals, retailers, public institutions, and consumers) substantially overpaid and were injured thereby on purchases of drugs manufactured and sold by defendants. The complaint further alleges that the Government of India used foreign exchange resources (U.S. dollars) that it owned to cover the cost of *all* drug items covered by the Complaint and imported from the United States into India. Thus, a consequence of the antitrust violations was that the Government of India spent more of its precious foreign exchange on drug imports that it would have without those violations.

The complaint was brought by India in several capacities: for proprietary purchases of drug items by governmental entities (complaint, pars. 5-6, App. 25a); as representative of various classes of Indian purchasers and consumers (hospitals, importers, retailers, wholesalers, and individual consumers) (pars. 7-9, App. 25a); as *parens patriae* "for direct out-of-pocket damages suffered by political subdivisions, individuals, hospitals, clinics, retailers, wholesalers, and importers in India" (par. 10, App. 26a); and as

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alia, *Chas. Pfizer & Co.* v. *F.T.C.*, 401 F.2d 574 (C.A. 6, 1968), *cert. denied*, 394 U.S. 920 (1969) (violation of § 5 of the F.T.C. Act); *United States* v. *Chas Pfizer & Co.*, 281 F.Supp. 837 (S.D. N.Y. 1968) (denying motion for acquittal, NOV, of violation of Sherman Act); 426 F.2d 32 (C.A. 2 1970) (reversing conviction), *modified*, 437 F.2d 957 (C.A. 2 1970), *aff'd by equally divided court*, 404 U.S. 548, (1972) (three justices not participating); 367 F.Supp. 91 (S.D.N.Y. 1972) (indictment dismissed).

While the F.T.C. and criminal cases were underway (and for one year thereafter) the statute of limitations was tolled under 15 U.S.C. 16(b). The period for filing new civil claims expired on December 1, 1974.

the "official representative of citizens, businesses, institutions and organizations in India, for direct out-of-pocket damages suffered by such citizens, businesses, institutions and organizations due to purchases of "B[road] S[pectrum] A[ntibiotics]" (par. 11, App. 26a).

Petitioner's complaint joined earlier complaints by Kuwait, Vietnam, Iran and the Philippines. Petitioners' complaint was followed by similar complaints by the Federal Republic of Germany, 4-74 Civ. 614 (D.Minn.); Spain, C.A. No. 74-1746 (D.D.C.); Colombia, C.A. No. 74-1747 (D.D.C.); and Korea, C.A. No. 74-1748 (D.D.C.).[2] All but two of the foreign sovereign complaints alleged *parens patriae* and official representative standing.

On November 19, 1975, four days after the filing of the complaint, defendants moved to dismiss, arguing that petitioner is not a "person" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15, and separately challenging the standing of petitioner to maintain suit in a *parens patriae* or official representative capacity.

Judge Lord denied both motions, basing denial on the "person" issue upon his decision and opinion concerning Kuwait and Vietnam *In Re Antibiotic Antitrust Actions; State of Kuwait* v. *Chas. Pfizer & Co., et al,* 333 F.Supp. 315 (S.D.N.Y. 1971). He denied the motion to dismiss the *parens patriae* and official representative allegations on October 23, 1974, in Miscellaneous Order 74-40 (App. 18a), based upon an earlier Miscellaneous Order No. 74-37, issued on

[2] The Governments of Kuwait and Spain have since withdrawn their complaints; Kuwait without prejudice to refile.

June 17, 1974, with respect to Iran and Vietnam (App. 19a). In the same Order 74-40, Judge Lord certified the *parens patriae*/official representative issue for interlocutory appeal pursuant to 28 U.S.C. § 1292 (b), just as he had earlier certified the same issue on September 5, 1974, in Miscellaneous Order No. 74-38 in cases involving Iran and Vietnam.

The Eighth Circuit granted permission to take the interlocutory appeals and consolidated all *parens patriae*/official representative cases under two docket numbers, 74-1847 and 74-1870. It also consolidated those appeals with a mandamus petition brought by defendants against Judge Lord after he had refused defendants' request to certify the "person" issue for intermediate appeal in cases involving the Philippines, Iran and Vietnam.

OPINIONS BELOW

In allowing a foreign sovereign to maintain suit as *parens patriae*/official representative, Judge Lord rejected arguments, based upon cases involving domestic States, that suit in such capacity (i) constituted a "taking" by the sovereign of the damage claims of its resident nationals without due process;[3] (ii) conflicted with a public policy preference (having due process underpinnings) in favor of class actions under Rule 23 of the Federal Rules of Civil Pro-

[3] *In re Multidistrict Vehicle Air Pollution Control Equipment*, 481 F.2d 122 (C.A. 9), *cert. denied*, 414 U.S. 1045 (1973); *California* v. *Frito-Lay, Inc.*, 474 F.2d 774 (C.A. 9), *cert. denied*, 412 U.S. 908 (1973); *Philadelphia Housing Authority* v *American Radiator & Standard Sanitary Corp.*, 309 F.Supp. 1057 (E.D. Pa. 1969), *aff'd*, 438 F.2d 1187 (C.A. 3 1970).

cedure;[4] and (iii) subjected defendants to the possibility of double liability. In Judge Lord's view, the State cases do not set out rules applicable to the relationship between a foreign government and its resident nationals, nor do due process considerations apply to that relationship. On practical grounds no risk exists of double recovery in these cases as between the sovereign and its nationals; as a legal bar, a recovery by the sovereign can be given *res judicata* effect.

On appeal, the Eighth Circuit reversed on the strength of the domestic State cases. It stated that "[p]rinciples of comity, international law and existing United States treaties do not afford foreign sovereigns the right to press their citizens' claims in a manner barred to domestic States vis-a-vis their citizens" (App. 13a). The Eighth Circuit mandated compliance with the exacting requirements of notice under Rule 23, even if thereby "the claims are rendered practically unenforceable" (App. 16a).[5]

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[4] *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 266 (1972).

[5] The class representative in a class action must turn over all sums recovered to the class members represented and may retain no portion of the recovery, beyond his own damages, as a reward for his services to the class. Any residue which cannot be so routed to class members remains with or must be returned to the defendant.

By contrast, the official representative approach as envisioned by the Government of India (and presumably by the other foreign sovereign plaintiffs who claim similar official representative status) calls for the sovereign to route any recovery sum to aggrieved resident nationals, using procedures available to it, as sovereign, within its own country. After a full, good-faith distribution effort has been made to accomplish the routing of such funds, the sovereign uses any residue, on an earmarked basis, for public welfare expenditures related to purposes associated with the original transactions. This is the concept of official representative described by

BACKGROUND STATEMENT

At the outset, it should be stressed that India is acting here, pursuant to Indian law, as the official representative of its citizens. For the reasons stated more fully below, India believes that principles of comity, international law and existing United States treaties require that American courts recognize its representative status.

Official representative status arises in this case out of several responsibilities that the Government of India carries out for the benefit of all its citizens.[6]

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counsel to the District Court in argument on defendant's motion to dismiss the *parens patriae* and official representative allegations in the complaint. Joint Appendix, Ct. of App., pp. 58-59a.

This use of recovered funds exceeds requirements which attend the disposition of funds in a *parens patriae* form of action; for in a true *parens patriae* situation, the sovereign retains all recovery funds for use for public purposes as it deems fit, without any undertaking or obligation to route portions of the recovery to aggrieved individuals in the proportion of their injury. *In re Antibiotic Antitrust Actions*, *supra*, 333 F. Supp. 278, 288.

A second distinction between official representative and class action concerns adherence to Rule 23 requirements. In the official representative action, the foreign state undertakes to follow its own rules and procedures in dealing fairly with its nationals. But the foreign state does not allow individuals or groups of its nationals to challenge its fitness to serve as their representative in the maintenance or in the conduct of the litigation. Its nationals are however free to take such legal steps in the courts of the foreign state as may be appropriate under the laws of that country to seek whatever relief from *their* government which the circumstances and their own views of the matter suggest.

[6] By contrast with *parens patriae*, "official representative" emphasizes a cluster of related concepts outside the common law by which a foreign government relates to its citizens under its constitution and laws and acts to protect and represent their interests

First, in countries such as India, where strict foreign exchange controls obtain, the sovereign is required to make scarce foreign exchange available by weighing the competing needs of importation of commodities, of industrial development, and of other economic and social objectives.[7] To the extent that these allocations have been distorted by purchases of overpriced drugs, a responsibility of India towards all its citizens requires that a remedy be pursued. Second, the Government of India is charged by its laws and constitution to provide health care to its citizens, including the supply of drugs in the most efficient manner possible. In carrying out this responsibility, India must allocate its available resources among the competing needs of hospitals, clinics, research agencies, and patients. Since these decisions can only be intelligently based upon present needs as opposed to a pattern of past purchases, the Government of India is required to oversee the distribution of any recovery for the violations alleged in the complaint.

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before various tribunals, both domestic and foreign. Instances in which standing in this capacity has been recognized appear in the civil law, as recognized in *The Maret*, 145 F.2d 431, 437 (C.A. 3 1944), (standing accorded to the Latvian consul to protect interests of absent foreign nationals under civil law doctrine of *negotiorum gestor*), and in the Vienna Convention on Consular Relations, 21 U.S.T. 78, T.I.A.S. 6820 (paragraphs 5(a), (e), (i) and (m) allow a consul to represent the interests of absent nationals of the sending state "before the tribunals and other authorities of the receiving state" to preserve the rights of those nationals unable to assume a defense of their interests).

[7] Such foreign exchange controls have long been commonplace and are widely used today by foreign governments. See, *French* v. *Banco Nacional de Cuba*, 23 N.Y.2d 46, 242 N.E.2d 704, 715 (Ct. App. 1968); Annual Yearbooks on *Exchange Restrictions*, published by the International Monetary Fund, New York, N.Y. in which the exchange restrictions of each country, maintained in a manner consistent with the Articles of the Fund, are described.

These responsibilities of India to Indians are wholly different from those of one of the States of the United States to its citizens.[7a] India must act as total sovereign, taking into account special needs of a developing country and forming policies consistent with the form of government its citizens have chosen. Our States bear none of these responsibilities, and, therefore, analogies between the States and foreign sovereigns are bound to fail.

India has also brought suit as *parens patriae,* recognizing that this common law concept, peculiar to the United States and Great Britain, might provide it with standing in this litigation.[8] However, *parens*

[7a] *C.f., Sanitary District of Chicago* v. *United States,* 266 U.S. 405, 426 (1925); *New Hampshire* v. *Louisiana,* 108 U.S. 76, 90 (1882).

[8] But *parens patriae* jurisdiction has had limited application in practice. *California* v. *Frito-Lay, Inc., supra,* 474 F.2d 774, 776; *Johnson* v. *State,* 18 N.J. 442, 114 A.2d 1 (N.J. 1955). Although the jurisdictional doctrine is perhaps not limited to these historically-conditioned situations, its extension into new applications has been restrained by statutorily developed solutions which deal with problem areas into which *parens patriae* might otherwise have expanded. *California* v. *Frito-Lay, Inc., supra,* 474 F.2d 774, 776. An effort by the State of Georgia to use *parens patriae* in an antitrust context to assert the damage claims of its citizens was considered by this Court in *Georgia* v. *Pennsylvania R.R.,* 324 U.S. 439 (1945), without resolution of the basic issue of standing and without the development of usable guidelines. More recently, lower courts have denied standing to States on such a jurisdictional basis referring them instead to such remedies as might lie under class action procedures. *Hawaii* v. *Standard Oil of California,* 301 F. *Supp.* 982, 986 (D. Hawaii 1969); *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp., supra,* 309 F.Supp. 1057, 1061; *California* v. *Frito-Lay, Inc., supra; In re Motor Vehicle Air Pollution Control Equipment, supra,* 481 F.2d 122. *Contra, State of West Virginia* v. *Chas. Pfizer & Co., supra,* 440 F.2d 1079, 1087 (dictum).

patriae is not a concept of Indian law and does not fully reflect the representative status being asserted here. If *parens patriae* status is available to the Government of India in this case, so be it; if not, that determination ought not to oust India as an official representative of its citizens.

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals has important consequences for the Administration of the Antitrust Laws in the Foreign Commerce of the United States and for American Foreign Economic Relations

1. The decision of the Court of Appeals is important in scope: In these antibiotics proceedings alone it affects foreign nations with very sizeable populations having important trade relations with the United States.[9] These claims place private antitrust enforcement in the foreign commerce at an important crossroads: Before these cases, there had been virtually no treble damage enforcement by foreign plaintiffs of any kind.[10] Now, nine sovereign states have

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[9] The 1972 *Statistical Yearbook* published by the Statistical Office of the United Nations, New York, New York, provides the following population statistics: India 550 million; West Germany, 60 million; Colombia, 24 million; Iran, 29 million; Korea, 32 million. The use of antibiotics in these countries has been extensive, and but for limits imposed by poverty and price of antibiotics, this use would have been even more widespread throughout these populations.

[10] In its amicus brief before the Circuit Court the Department of Justice (at pp. 9-10) stated it knew of only two instances in which foreign plaintiffs had brought suit under the antitrust laws. *Moviecolor, Ltd.* v. *Eastman Kodak Co.*, 24 F.R.D. 325 (S.D.N.Y. 1959), *aff'd* 288 F.2d 80 (C.A. 2), *cert. denied*, 368 U.S. 821 (1961); and *Afran Transport Company* v. *National Maritime Union*, 169 F. Supp. 416 (S.D.N.Y. 1958); 175 F. Supp. 285 (S.D. N.Y. 1959). In the latter case, two foreign governments appeared

sought redress. If these initiatives are blocked, antitrust enforcement in the foreign commerce of the United States will revert to the somnolent past in which U.S. companies were virtually free from private monitoring of their antitrust compliance. Moreover, having been rebuffed in their efforts to secure redress by means of judicial recourse, foreign sovereigns may consider other, no doubt less-effective (and less-desirable) means to protect their national interests.

The preference for class actions (elevated by the Court of Appeals to an exclusionary rule based upon public policy considerations) may not entirely please the domestic States; but the States have in these very antibiotics proceedings been certified as class representatives under Rule 23 for very broad classes, including consumer classes.[11] But on the face of it, class actions in behalf of Indian consumers—and probably even for Indian wholesalers, retailers, hospitals and clinics—will not be certifiable.[12] An attempt to satisfy

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as *amici curiae*. In *French Republic* v. *Saratoga Vichy Co.*, 191 U.S. 427 (1903), the Government of France brought a damage claim against a U.S. defendant for unfair competition. The true party in interest was not the Government however but a French private corporation. 191 U.S. at 438.

[11] *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 284 (S.D.N.Y. 1971); *State of West Virginia* v. *Chas. Pfizer & Co., Inc.*, *supra*, 440 F.2d 1078, 1089-1091; *Indiana* v. *Chas. Pfizer & Co., Inc.*, 51 F.R.D. 493, 494 (S.D.N.Y. 1970); cf., *State of Illinois* v. *Bristol-Myers Co.*, 470 F.2d 1276 (U.S. App. D.C. 1971); *Hawaii* v. *Standard Oil Co.*, *supra*, 405 U.S. 251, 266.

[12] Rule 23(c)(2) specifically requires that notice be given to class members in sufficient detail so they may choose to be included in or excluded from the class. Here, the giving of adequate notice to the foreign class would pose very difficult problems of class manageability which would strain the resources of the District Court. There are formidable language problems since notices would

Rule 23 requirements to maintain such classes will encounter overwhelming practical difficulties.[13] A foreign sovereign, must also consider its own public policy considerations. The road to class actions carries for a foreign sovereign, unlike a domestic state, the risk of unacceptable political consequences.[14] There is therefore no meaningful alternative to official representative status for the Government of India by which these damage claims can be brought to judicial consideration.

2. The United States is a major creditor country, having issued foreign assistance loans and grants to

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be issued in over 12 languages; there are communication difficulties that are obvious in a nation of 550 million people; there are problems of literacy; and ultimately there is the conceptual hurdle of explaining to a foreign populace the relationship between individual purchases in the domestic Indian market and U.S. antitrust notions attending sales of the drug items in the foreign commerce of the United States. For all classes except importers the conceptual hurdle alone may be insurmountable.

[13] In the only attempt to have a class of any size certified whose members were all non-resident aliens, the Second Circuit in a recent securities case quickly concluded the matter was unmanageable. *Bersch* v. *Drexel Firestone, Incorporated*, 519 F.2d 974, 996-97 (C.A. 2 1975). The foreign class in *Bersch* was much smaller and would surely have raised fewer problems of manageability than the classes of Indian purchasers involved here.

[14] Conceivably, a class of importers might be manageable and certifiable under Rule 23. But India wishes to benefit consumers who ultimately absorbed the injury. Since importers are in many cases affiliates of defendants (by contractual arrangement or equity investment), a political desire to bring this action to benefit the general public should not be transformed into a special benefit only for importers. This is especially so, since India, like many capital importing countries, maintains investment incentive programs which allow repatriation of profits to foreign parents of local companies and a recovery by importers might well raise profit levels so as to justify the repatriation of dividends to defendants from these affiliated importers.

foreign nations for many years under bilateral aid programs governed by the Foreign Assistance Act of 1961 as amended, 22 U.S.C. §§ 2151 *et seq*, and prior legislation.[15] These foreign aid programs have had a significant impact in altering pre-existing foreign trade patterns, since foreign assistance funds have been tied overwhelmingly by legislative directive to procurement in the United States.[16] This has been especially true for foreign aid funds used for the purchase of antibiotics.[17] The funds made available

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[15] The United States is also a major contributor to international lending organizations such as the World Bank which in turn lend funds to foreign governments.

[16] Thus, 22 U.S.C. § 2354 provides that foreign aid funds are available for procurement outside the United States only if the President makes certain determinations as to adverse effects upon the economy of the United States: *i.e.* labor surplus considerations, balance of payment considerations, and pricing. Other provisions dealing with the same considerations appear at 22 U.S.C. §§ 2161 (b)(6); § 2171(b)(5), (6), and the ultimate sentence of § 2171; § 2197(k); and § 2211(b)(4).

[17] Section 606(c) of the Foreign Assistance Act, 22 U.S.C. § 2356 (c) ties the purchase of drug items very closely to procurement in the United States:

> "Funds appropriated pursuant to this Chapter shall not be expended by the United States Government for the acquisition of any drug product or pharmaceutical product manufactured outside the United States if the manufacture of such drug product or pharmaceutical product in the United States would involve the use of, or be covered by an unexpired patent of the United States which has not previously been held invalid by an unappealed or unappealable judgment or decree of a court of competent jurisdiction, unless such manufacture is expressly authorized by the owner of such patent."

The motive force behind this provision is to benefit Chas. Pfizer & Co. by preventing off-shore purchase of tetracycline (one of the major broad-spectrum antibiotics involved in these proceedings) with foreign assistance funds. See, debate on the Foreign Assistance Act of 1961, 107 Cong. Rec. 16283 (1961) (Statement of Congressman Roudebush).

by the United States to India were used at various times and in significant quantities for the importation from the United States of antibiotics.[18]

The readiness and good grace with which debtor nations approach their debt burdens to the United States might well be influenced by the outcome of the issue of standing presented in these cases. For, if goods sold by defendants in substantial amounts to foreign importers were overpriced by virtue of antitrust and fraud violations,[19] loan obligations associated with the funds borrowed by foreign governments to finance these purchases are not reduced by the amount of the overcharges. The foreign government must use its own means for securing refunds from the suppliers. And failing that recourse, the foreign governments may well be justified in taking a jaundiced view towards their obligations to repay in full tied-loan funds used to pay for such overpriced goods.[20]

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[18] The record does not show what percentage of total purchases of antibiotics by Indian importers were made with foreign assistance funds from the United States or what percentage was accomplished with loans or grants; but it may be safely assumed that a not inconsiderable portion of purchases in the United States by Indian importers were made with such funds loaned or granted to India by the United States.

[19] In *State of West Virginia* v. *Chas. Pfizer & Co.*, *supra*, 440 F.2d 1079, 1084, the court in related proceedings (involving domestic States which settled their claims in these antitrust antibiotics proceedings) noted that the formula which underlay the settlement plan was based upon a calculation that prices for antibiotics actually charged by defendants "contained an overcharge of 66-2/3 percent."

[20] But if a beneficiary country of U.S. foreign assistance can collect as a treble damage plaintiff, the United States may well be able to negotiate a refund to itself for a portion of the recovery attributable to the original foreign aid. This is essentially the ar-

3. Private U.S. corporations have made substantial investments in production and distribution enterprises abroad. From a U.S. public-policy perspective it is desirable to encourage foreign governments to bring disputes concerning important trade matters into U.S. courts and to litigate by means of damage actions allegations of fraud and impropriety significantly affecting their interests and the interests of their nationals. (It is after all a tribute to American justice that foreign governments are willing to bring claims on behalf of their citizenry for adjudication before American courts.) It would be better to encourage this tendency, and with it the rule of law, than to subject American enterprise to political reactions in host countries.

4. The Department of State has exhorted foreign nations to undertake initiatives in the area of antitrust by negotiating antitrust clauses in bilateral executive agreements concluded with foreign governments under authority of foreign assistance legisla-

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rangement worked out between the United States and domestic States on certain grant-in-aid programs to the domestic States for application in situations where a State subsequently appears as an antitrust plaintiff. See, *State of Minnesota* v. *United States Steel*, 299 F.Supp. 596, 610 n. 57 (D.Minn. 1969), vacated on other grounds 438 F.2d 1380 (C.A. 8 1971).

Recovery of damages by a foreign aid beneficiary country diminishes *pro tanto* the need by that country for additional foreign aid assistance and thereby benefits the U.S. taxpayer. Reprocurement of goods with funds attributable to the recovery can well be expected to be made in the United States. Benefits which may accrue to U.S. interests have been held to be relevant considerations in a determination whether a foreign plaintiff has standing to maintain suit in a U.S. court. *Constructores Civiles de Centroamerica, S.A.* v. *Hannah*, 459 F.2d 1183, 1192 (C.A. D.C. 1972).

tion.[21] Many Treaties of Friendship and Commerce with foreign nations contain undertakings by each contracting party to take antitrust action, *qua* sovereign, to safeguard the mutual trade of the two countries.[22]

These efforts would justifiably be viewed with cynicism by foreign governments if the opinion below is

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[21] *See e.g.*, Article II of the Economic Cooperation Agreement with the Government of Viet-Nam (a foreign sovereign plaintiff in these proceedings), September 7, 1951, 2 U.S.T. 2205, T.I.A.S. 2346, which states in pertinent part as follows:

> "In order to assure maximum benefits to the people of Viet-Nam from the assistance to be furnished under the present agreement by the Government of the United States of America, the Government of Viet-Nam will use its best efforts: * * * D. to cooperate with other countries to eliminate public or private restrictive practices hindering domestic or international trade."

[22] The Treaty of Friendship, Commerce and Navigation between the United States and the Republic of Korea (a foreign sovereign plaintiff in these antibiotics proceedings), entered into force November 7, 1957, 8 U.S.T. 2217, T.I.A.S. 3947, provides in Article XIII as follows:

> "The two Parties agree that business practices which restrain competition, limit access to market or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises, or by combination, agreement or other arrangement among such enterprises, may have harmful effects upon commerce between their respective territories. Accordingly, each Party agrees upon the request of the other Party to consult with respect to any such practice and to take such measures as it deems appropriate with the view to eliminating such harmful effects."

Substantially similar provisions are contained in the following treaties of friendship, commerce and navigation, among others, to which the United States is a party: Federal Republic of Germany, 7 U.S.T. 1858-59, T.I.A.S. 3593; Greece, 5 U.S.T. 1829, 1861-63, T.I.A.S. 3057; Ireland, 1 U.S.T. 785, 786, T.I.A.S. 2155; Israel, 5 U.S.T. 550, 569, T.I.A.S. 2948; Italy, 63 Stat. 2266, T.I.A.S. 1965; Nicaragua, 9 U.S.T. 449, 463, T.I.A.S. 4024; and Japan, 4 U.S.T. 2063, T.I.A.S. 2863.

allowed to stand. What good are such policies if the Federal courts tell foreign governments that they have no standing to assert the antitrust claims of their citizens, especially when no other means to judicial redress is available?

5. Foreign nations with free enterprise or mixed economies will find themselves precluded from asserting official representative standing by virtue of the decision of the Court of Appeals. But socialist and communist states can as a practical matter avoid this disability, since in those countries all imports are accomplished by governmental organs.

The Writ Should Be Granted To Review Important Issues Implicating the Sovereignty of Nations

1. The decision of the Court of Appeals makes no concession to foreign and international elements involved in these cases. The Eighth Circuit simply applied an analysis derived from cases involving the domestic states to the foreign sovereigns. But because the responsibilities of a foreign sovereign to its citizens differ greatly from those of a State to its citizens, it is surely more appropriate to look at the rules for standing that are applied to the United States.

When the United States acts as sovereign in bringing an action in its name for the benefit of private parties, its standing is established if one of three requirements is met: The United States itself must have a "pecuniary interest in the remedy sought"; or, it must be under an "obligation to the party who will be benefited to sustain an action for its use"; or, an "obligation to the general public exists which requires the United States to bring it". *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 286 (1888);

cf., United States v. *Minnesota,* 270 U.S. 181, 194 (1925).[23]

In this case, the foreign sovereign brings to bear considerations which satisfy the requirements imposed upon the United States. These considerations contain elements which are absent in any analysis of the standing of domestic States.

(a) The "pecuniary interest" of petitioner derives from its absolute control of and from its property interest in the foreign currency reserves of the country.[24] All purchases in the import trade into India were accomplished with foreign currency made available by the petitioner to private importers. The importers acquired foreign currency from their government by paying over local currency at exchange rates established by the government.[25] When overcharges occurred in connection with import transactions, a smaller quantity of goods was obtained for the price paid than would otherwise have been the case if there had been no antitrust violations. The

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[23] The enfolding of the doctrine since *San Jacinto Tin* is set out and brought up to date in *United States* v *Brand Jewelers, Inc.*, 318 F. Supp. 1970 (S.D.N.Y. 1970).

[24] "Control of national currency and of foreign exchange is an essential governmental function". *French* v. *Banco Nacional de Cuba, supra,* 242 N.E. 2d 704, 715, see also, *Victory Transport* v. *Comisaria General,* 336 F.2d 354, 360 (CA 2 1964), *cert. denied* 381 U.S. 934 (1965).

[25] In the system of control practiced by petitioner, typical for nearly all countries maintaining strict exchange control systems, an importer must apply to the central bank of his government for a license to import goods. The grant of the license carries with it authorization to use foreign exchange through the domestic commercial banking system in the authorized amount.

importer may have been deprived of local currency on his purchase, but the all-precious foreign currency loss was sustained only by his government.[26]

Domestic States have no power or responsibility relating to the management of foreign exchange.[27]

(b) Whereas a State of the Union can show no "obligation to the general public" which requires it to bring an action to assert the damage claims of its citizens, the Government of India has such an obligation pursuant to its laws, its Constitution, and its relation as sovereign to its people under its social and political system and institutions. A U.S. court can freely examine the assertions of a State as to its obligation to its citizens to maintain a *parens patriae* action. But the claim of "obligation" interposed by the Government of India under its own laws cannot be challenged by an American court without raising serious problems of comity among sovereign states, treaty undertakings and international law.

With respect to comity.

(i) Considerations of comity—the avoidance of affront to a foreign so as not to embarrass the executive arm of the United States in the conduct of its foreign relations—have prompted courts to refrain

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[26] By virtue of its membership in the International Monetary Fund and 22 U.S.C. § 286h, the United States is committed, pursuant to Article VIII(2)(b) of the Articles of Agreement of the Fund, to pursue a national policy which safeguards the exchange control regulations of each member country. This national policy elevates to special importance matters concerning the foreign exchange concerns of member countries.

[27] *See*, cases cited *supra*, note 7a.

from investigations as to the conduct of a foreign sovereign within its own borders. U.S. courts properly decline to determine whether the act of a foreign government, taken assertedly in conformity with its own laws, complies with those requirements.[28] India's assertion of an obligation to its citizens to bring this action falls well within these traditional areas of self restraint in the name of comity.

(ii) The preference for class actions expressed by the Court of Appeals would, if it could be followed, create opportunities for affront which foreign sovereigns would find unacceptable. A determination under Rule 23 must be made that the sovereign is a fit representative of the class who will adequately represent the interests of the class. Even theoretically, it would be unusual for a foreign sovereign to be willing to have a foreign court consider issues so close to questions concerning the legitimacy of the government. Any disgruntled national or group which can manage to secure counsel can use the Rule 23 standards to attack its government in the foreign court.[29] Defend-

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[28] See, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 415 n. 17 (1964), where the cases are collected. It is essentially also upon such notions—the implication of sovereignty—that doctrines relating to the sovereign immunity of foreign states, when they act in their sovereign as opposed to their commercial capacities, have been adopted by the lower courts and proclaimed by the Department of State. *Victory Transport* v. *Comisaria General*, *supra*, 336 F.2d 354; *Petrol Shipping Corp.* v. *Kingdom of Greece*, 360 F.2d 103 (C.A. 2 1965), *cert. denied*, 385 U.S. 931 (1966); *Premier Steamship Co.* v. *Embassy of Algeria*, 336 F.Supp. 507 (S.D.N.Y. 1971). The distinctions between commercial and sovereign acts have been set forth by the Department of State in the so-called "Tate Letter", 26 Department of State Bull. 984 (1952). This Court has not had occasion to consider the distinction articulated in the Tate Letter.

[29] In one of the State cases involved in these antibiotics proceed-

ants themselves can hold the foreign government hostage and embroil it in such "factual" considerations.[30]

With respect to treaty considerations.

Antitrust exhortations contained in treaty materials and legislation refer to the obligations of foreign sovereigns,[31] and not to domestic States. A treaty obligation imposed upon a sovereign to safeguard concerns affecting the public at large serves as one more justification for the assertion of standing by the sovereign to bring action in its sovereign capacity.[32]

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ings a group of Virginia residents challenged the fitness of the Attorney General of the Commonwealth of Virginia to be the class representative of consumers on grounds that his responsibility to the State and its political subdivision was antagonistic to the interests of individual citizens. *In re Antibiotic Antitrust Actions*, *supra*, 333 F.Supp 278, 296 (S.D.N.Y. 1971). It would certainly be an unacceptable affront to the sensibility of a foreign sovereign to have to litigate that kind of question concerning its fitness and interest in the matter with groups of its nationals before a foreign court.

[30] In a companion case involving the Philippines (the record of which was consolidated by the Court of Appeals for purposes of appeal), the plaintiff foreign sovereign has sought to have the District Court certify a class of private hospitals in the Philippines with itself as class representative. Defendants have challenged the fitness of the sovereign to represent the class. Portions of that challenge appear in the Appendix at 27a.

[31] *See supra*, notes 21-22 relating to the duties of foreign sovereign to eliminate private restrictive practices in their trade with the United States. Foreign governments are also adjured to refrain in their public acts, decrees and legislation from promoting "restrictive trade practices". See, 22 U.S.C. § 286k and Art. XX, General Agreement on Tariffs and Trade, 61 Stat. (5), (6); T.I.A.S. 1700.

[32] *See, Sanitary District of Chicago* v. *United States*, *supra*, 266 U.S. 405, at 425. The antitrust provisions in F.C.N. treaties, *see supra* notes 21-22, are of a special order. The President is directed at

With respect to international law.

Under international law when one state picks up the claims of its citizens and presents them for payment to the government of another state, the paying state does not inquire whether and to what extent the receiving state intends to pass on the proceeds of the payment to the nationals in whose behalf the claim is espoused.[33] The reason is obvious: It would offend basic notions of sovereignty for another sovereign to inquire into that relationship. Here, the Eighth Circuit is concerned with the due process rights of residents of the Punjab who purchased antibiotics from village pharmacists. In the view of the Court of Appeals, due process requires it to defend the right of those absent purchasers to choose their own representative to pursue their claims against

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22 U.S.C. § 2351(b)(4) to seek, "compliance by other countries or areas with all treaties of commerce and trade * * * and [to] take all reasonable measures * * * to secure compliance therewith". If by virtue of such treaty provisions standing in an official representative capacity is accorded another foreign sovereign, the citizens of India are entitled to equal treatment under "most favored nation" treaty provisions with India relating to property in the United States. *See, Article V, Convention as to Tenure and Disposition of Real and Personal Property* (with Great Britain), 31 Stat. 1939; T.S. 146; 1 Malloy 774 (1899); and Supplementary Convention. 32 Stat. 1914; T.S. 402; 1 Malloy 776 (1902).

[33] Indeed, the United States "can legally espouse on behalf of a national of the United States a formal claim through diplomatic channels and/or submit the claim for adjudication by an international arbitral tribunal without being requested to do so either formally or informally by the aggrieved national." A. Rovine, *Digest of U.S. Practice in International Law*, p. 332 (1973), quoting Fabian A. Kwiatec, Assistant Legal Adviser for International Claims in the Department of State, speaking on behalf of the United States.

defendants; and due process further requires the Court to deny its assistance to a confiscation by petitioner of the claims owned by its nationals.

But petitioner's claims in this regard are no different from where a sovereign espouses a private claim and presents it for payment to another government. Due process is no more an issue here than where the Executive Branch makes an award to a foreign government through diplomatic means on an international claim brought by the foreign sovereign in behalf of certain of its citizens.[34] Review by this Court of the incompatibility of doctrine in this area of international claims is required.

2. The preference for class actions as an overriding public policy finds little support in the realities which obtain where the foreign sovereign is plaintiff. The foreign sovereigns have undertaken to route so much of any recovery that can be so routed to institutions and individuals who were aggrieved by the actions of defendants. The burden therefore lies upon the foreign governments, acting within their own countries and with due sensitivity to local procedures

[34] The perception of a due process inhibition by the Court of Appeals must surely relate to the notion that the relationship between petitioner and its citizens becomes a matter of constitutional concern because "state action", in a Fifth Amendment sense, is involved whenever a federal court lends its assistance to a litigant. *See, Shelley* v. *Kraemer*, 334 U.S. 1, 14 (1948). With that justification for the court's concerns, the claim for payment by the foreign sovereign must be viewed as a request to an arm of the U.S. Government: the request is then to the U.S. Government, through its judiciary, to enforce payment to petitioner. Viewed in this manner, the relationship between the two governments justifies in special measure the application of the international law rule of not looking behind the claim of the espousing state.

and the needs of their citizenry, how best to carry out these undertakings.[35]

The drafters of Rule 23 expressed no supposition or intention that the Rule should apply as a preferred mode of procedure in other countries, in which other languages, customs, and economic conditions prevail. The "due process" rights of Indian consumers and other classes of aggrieved antibiotics users and purchasers will be safeguarded, *mutatis mutandis*, by the Indian Government under its own Constitution and laws.[36]

3. Contrary to the fears of the Court of Appeals, there is no danger that defendants will be subjected to the possibility of multiple recoveries if the foreign sovereigns are accorded standing. Petitioner claims

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[35] The court can fashion its decree in any manner in which the dictates of prudence and common sense suggest, so that the undertaking of the foreign sovereign plaintiff to route funds back to its citizens under its procedures is in fact an undertaking made to the court and reduced by it into proper legal form. *Cf.*, *Carnivale Bag Co., Inc.* v. *Slide-Rite Mfg. Corp.*, 395 F. Supp. 287, 292 (S.D. N.Y. 1975); *State of Washington* v. *American Pipe & Construction Co.*, 274 F. Supp. 961, 965 (D.C. Cal., Hawaii, Or. & Wash. 1967). *State of Minnesota* v. *United States Steel Corporation*, 308 F.Supp. 963 (D. Minn. 1970); *State of West Virginia* v. *Pfizre, supra*, 440 F.2d 1079.

[36] An undertaking by the foreign sovereign should suffice. There is an analogy in sovereign immunity cases. A Court which issues judgment against a foreign government (in a case where commercial activity by the foreign sovereign underlies the liability) is aware the sovereign cannot be compelled to pay and its funds cannot be levied upon in satisfaction of the judgment. *Dexter & Carpenter, Inc.* v. *Kunglig Jarnvagsstyrelson*, 43 F.2d 705 (C.A. 2, 1930); *Weilamann* v. *Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S. 2d 469 (Sup. Ct. 1959). But the law assumes the foreign government will nevertheless pay the judgment out of respect for the institutions of the forum.

that under its law and practice it is the official representative of its aggrieved nationals with capacity to assert these claims. Petitioner surely has jurisdictional authority within India over its resident nationals. Thus, petitioner can undertake to the District Court that no additional claims against defendants will be brought by its resident nationals. That assurance can most confidently be made in these proceedings, since the time-limitation in which new claims can be brought has expired.[37]

Judge Lord conceived of *res judicata* effect attaching to any judgment in behalf of the foreign sovereign as against any new or additional private claim which was redundant (App. 22a). It would appear only necessary for the District Court to provide in any judgment which it enters that the foreign sovereign will hold the defendants harmless and will assume the burden of any defense in the event that redundant claims are perchance brought by resident nationals of the foreign sovereign.[38]

5. The Court of Appeals decided that the assertion of official representative standing by a foreign

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[37] Of course, if India can proceed as official representative, the class action allegations will not be presented to the District Court for Rule 23 certification.

[38] *Compare, State of Washington* v. *American Pipe & Construction Co., supra,* 274 F. Supp. 961, 965:

> Defendant has also raised the spector of double liability it sued by the general contractors. Defendant's argument does nothing more than present this court with a hypothetical question concerning the allocation of provable injury, not with that of the standing to maintain a cause of action.

sovereign constitutes a "taking" or a confiscation of the property of its citizens, bringing to bear American public policy considerations that refuse to give effect to foreign confiscations. The implications of this holding upon the espousal of claims by foreign states are serious.

Here, there has been no "taking". The undertaking of the foreign sovereigns to route payments to aggrieved individuals (and only to use residue funds which cannot be so routed for related public purposes) indicates that such "taking" as may exist is in reality merely a form of representation. If there is a taking in a temporary sense, it is only for the purpose of asserting the claim. And the taking is in fact *with* rather than without compensation.[39]

Moreover, if there is a taking, it is accomplished by a foreign government under its own law and in a manner that affects only its resident nationals. International law does not concern itself with such situations, or with questions raised by such foreign governmental actions. *United States* v. *Belmont*, 301 U.S. 324, 332 (1936). The act of state doctrine precludes an investigation into such questions concerning confiscation.

The Court of Appeals suggests that the antitrust claim represents intangible property—a chose in ac-

[39] The compensation is necessarily accomplished after the fact, that is, after recovery rather than before. For it would be impossible for petitioner to determine an appropriate value to pay each aggrieved purchaser in India before the claim as a whole had been successfully prosecuted. The claims here are not liquidated sums which defendants admit are due and owing. Quite on the contrary: the claims are strongly contested on issues of liability as well as on other grounds.

tion—located in the United States. Given such a situs the act of state doctrine does not apply. But this decision is the first that has held that a foreign sovereign may not take a contested unliquidated claim of its citizens, arising out of transactions within its territory, simply because that claim is "sited" in the United States.

The territoriality limitation on the act of state doctrine has frequently been alluded to by this Court, but it has not been closely defined.[40] Whatever the scope may be of that requirement concerning corporeal property or its proceeds upon sale, the chose in action here is hardly that form of "property" which suggests itself as creating an exception to the application of act of state. Justice Frankfurter, concurring in *United States* v. *Pink*, 315 U.S. 203, 239 (1941), doubted whether an intangible right located in the United States should ever be viewed as that form of property which creates an exception to act of state.[41] It is a long stretch indeed from rights to tangible

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[40] The doctrine in its traditional formulation applies to "public acts a recognized sovereign committed within its own territory," *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. 398, 401; or to "acts done within their own states in the exercise of governmental authority," *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897).

[41] The matter has been made more ambiguous by the enactment of the "Hickenlooper Amendment", 22 U.S.C. § 2370(e)(2), by which the Congress overturned much of *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, dealing with the act of state doctrine. Admitting even that Hickenlooper did not overrule all of *Sabbatino*, it nevertheless remains that in the only legislative statement on act of state the Congress limited itself to tangible "property" rights and excluded contract rights from its attention. See, *French* v. *Banco Nacional de Cuba*, 23 N.Y.2d 46, 242 N.E.2d 704, 714-15 (N.Y. 1968).

property or to its proceeds (or even from liquidated claims such as bank accounts or admitted debts for goods received)—at issue in act of state cases that have reached this Court—and the notion adopted by the Court of Appeals that a contested antitrust claim must be located in the United States, thus precluding the application of the act of state doctrine.

The Writ Should Be Granted to Resolve Conflicts Between Decisions of Courts of Appeal and to Resolve Conflicts in Principle Between the Decision of the Eighth Circuit and Opinions of This Court.

1. Whereas the Eighth Circuit finds an overwhelming public policy preference for the class action (even if this preference destroys all hope of remedy), the Second Circuit in *State of West Virginia* v. *Chas. Pfizer & Co., supra,* 440 F.2d 1079 expressed a different view in the $100 million settlement cases involving the domestic States. The Second Circuit reviewed a settlement which the District Judge approved and had channelled into a class-action arrangement. In dictum, the Second Circuit observed that it would perhaps have been more proper for the States to have maintained the actions as *parens patriae,* 440 F.2d at 1089.

The dictum of the Second Circuit appeared as an invitation: *Parens patriae* standing would be accorded to domestic States in new complaints in these very same antibiotics proceedings; and, by a parity of reasoning, official representative standing would be accorded foreign sovereigns.[42] The attitude of the Second Circuit conflicts with the preclusive hostility

[42] It should be noted that most of the foreign sovereigns' complaints, including that of India were initiated after the Second Circuit opinion had been published.

to representative forms of action expressed by the Eighth Circuit.

2. Whereas the Eighth Circuit finds in the localization of the antitrust claim in the United States a fatal flaw barring application of the act of state doctrine, *French* v. *Banco Nacional de Cuba, supra,* 242 N.E.2d 704, 712-15, suggests a different view of the territorial requirement as it concerns intangible property. The *French* court considered contract rights as falling outside the Hickenlooper exception to act of state.

3. The Eighth Circuit adopts an approach that would deny foreign citizens their day in court; this Court has often held that the antitrust laws are not to be interpreted to deny plaintiffs an opportunity to challenge antitrust violations.[43] For example, in *Hanover Shoe* v. *United States Machinery Corp.,* 392 U.S. 481 (1968), this Court rejected the "passing-on" defense out of concern that it could be raised to bar suits by all subsequent purchasers except the consuming public. Members of the consuming public would each have only a tiny stake in a lawsuit and little interest in attempting a class action.

Hanover Shoe clearly implies that the most desirable objective would be to route an antitrust damage recovery to individual consumers; but if that is not practicable in major litigation, where each consumer has only a tiny interest, intermediate purchasers

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[43] See discussion in *State of West Virginia* v. *Pfizer, supra,* 440 F.2d 1076, 1087-88; *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134 (1968).

should be allowed to put forward the claim. The alternative would be to allow those who violate the antitrust laws by price fixing or predatory practices to retain the fruits of their illegality—their "pot of gold".[44]

Here, the Eighth Circuit turns the reasoning of *Hanover Shoe* on its head. It bars the road to consumer recovery via the only effective machinery which can assure such recovery—the official representative action, with an undertaking by the Government of India to accomplish refunds to consumers. Review by this Court is required to provide guidelines on what is an important issue: If as a practical and political matter, private damage actions by large foreign classes are foreclosed, whether foreign sovereigns shall be allowed official representative standing to assert the claims of their resident nationals.

4. Whereas this Court has limited the right of a defendant to assert as a defense the constitutional

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[44] The term was adopted by Judge Lord, *In re Antibiotic Antitrust Actions*, *supra*, 333 F. Supp. 278, 282-83:

> It should be noted at the outset that difficulties in management are of significance only if they make the class action a *less* "fair and efficient" method of adjudication than other available techniques. This perspective is particularly important in the present cases where the defendants, after reciting potential manageability problems, seem to conclude that no remedy is better than an imperfect one. The court would be hesitant to conclude that conspiring defendants may freely engage in predatory price practices to the detriment of millions of individual consumers and then claim the freedom to keep their ill-gotten gains which, once lodged in the corporate coffers, are said to become a "pot of gold" inaccessible to the mulcted consumers because they are many and their individual claims small.

rights of persons not before the court,[45] here (and especially with respect to the "taking" argument), the Eighth Circuit accepts defendant's arguments on protection of the property rights of absent Indian nationals. In cases involving a "taking" by a foreign government in which public policy considerations of the forum defeated an act of state defense the persons aggrieved by the taking were before the court.[46]

The propriety of a defendant's raising such a constitutional defense must be related also to the constitutional objections surrounding the invocation of Rule 23 class action requirements. A defendant may be heard to complain that it will be subjected unfairly to duplicative recoveries if class action procedures are not followed; but where, as here, that risk does not exist, the principle put forward by this Court as to who may raise constitutional objections would appear to foreclose defendants from making such arguments.[47]

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[45] *See, New York ex. rel. Hatch* v. *Reardon*, 204 U.S. 152 (1906); *Yazoo & M. Valley R. Co.* v. *Jackson Vinegar Co.*, 226 U.S. 217 (1912); *Standard Stock Food Co.* v. *Wright*, 225 U.S. 540 (1912); *Rosenthal* v. *New York*, 226 U.S. 260 (1912); *Tileston* v. *Ullman*, 318 U.S. 44 (1943). There are exceptions to this rule in limited cases where the party asserting the right stands in close relation to the absent holder of the right. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). Such is clearly not the case here.

[46] The cases are collected for the United States, Canada, and the United Kingdom in Whitman's Digest of International Law, Dept. of State, 1968, pp. 54-76. In each case it is the aggrieved individual (and not the defendant) who urged that effect not be given to the act of confiscation of the foreign sovereign.

[47] In *State of Minnesota* v. *United States Steel Corp.*, *supra*, 308 F.Supp. 963, 965 the Court stated:

> The reimburser, the State of Minnesota is suing and the reimbursees, the various counties, are not. Again, however, there is no duplication of claims since the various reimbursee

The foreign nations involved in these antibiotics cases, the international foreign community in general, and the lower federal courts require the assistance of this Court in resolving these conflicts and review of issues of importance and urgency raised by the decision of the Court of Appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be granted.

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Counties did not and cannot now become members of the class of plaintiffs and as to them the statute of limitations clearly has run . . . As to those Counties who joined the class timely in these cases, the court will be vigilant to prevent any double recovery. The court does not believe it lies in the mouth of those who have conspired to break the law, (if in fact such is subsequently proven) to avoid their just deserts under the circumstances of this case on a technical defense as to who has standing to sue. If in fact the prices of steel were conspiratorially higher than otherwise they would have been, someone paid the higher price and it comes with poor grace to argue that the wrong party is suing, so long as there is no danger of duplicity of claims. *Supra*, 308 F. Supp. 963, 965.